81-1035

No. _____

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

PATRICIA LAIRD, a/k/a PATRICIA HORNE and SHELTON FLETCHER HORNE,

Appellants,

vs.

THE STATE OF SOUTH CAROLINA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF

SOUTH CARCLINA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED BY APPEAL

Did the trial court violate the due process clause of the 14th Amendment of the United States Constitution by charging the South Carolina Statute which stated that possession of more than one ounce of marijuana made the Appellants "prima facie guilty" of possession of marijuana with intent to distribute it?

LIST OF ALL PARTIES

All parties are listed in the caption to this case.

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OPINION BELOW

The opinion relevant to this Appeal is that of the South Carolina Supreme Court, dated September 2, 1981. It is reproduced in the Appendix at page A-1. This decision is a mere summary dismissal of the Appeal, without substantive discussion.

JURISDICTION

A criminal action was brought against the Appellants by the State of South Carolina. At the trial court level, a South Carolina Statute was charged to the jury. At both the trial court level and after conviction, on Appeal to the South Carolina Supreme Court, the Appellants contended this statute was inconsistent with the federal constitution. These contentions were denied by an Order of the South Carolina Supreme Court dated September 2, 1981, which is the Judgement to be reviewed.

The statutory provision which confers jurisdiction of this Appeal on this court is found at title 28 of the United States Code at section 1257. That statute permits Appeal where the validity of a state statute is drawn into question as being repugnant to the federal

constitution, and the decision is in favor of the statute's validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment of the United States Constitution is as follows:

Section one. . . . no state shall . . . deprive any person of life, liberty, or property without due process of law . . . .

Section 44-53-370 of the Code of Laws of South Carolina (1976) provides in relevant part that

" (a) Except as authorized by this article it shall be unlawful for any person:

" (1) To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance;

"(2) To create, distribute, dispense or possess with intent to distribute or dispense, a counterfeit substance.

* * * *

"(d) . . . (3) Possession of more than ten grains of cocaine, one hundred milligrams of alpha-or beta eucaine, four grains of opium, four grains of morphine, two grains of heroin, one hundred milligrams of isoalpecaine, twenty-eight grams or one ounce of marijuana, ten grams of hashish or more than fifty micrograms of lysergic acid diethylamide (LSD) or its compounds shall be prima facie guilty of violation of subsection (a) of this section . . . ."

STATEMENT OF THE CASE

The Appellants were charged with possession of marijuana with intent to distribute, which carries a substantially greater sentence under South Carolina Law than does simple possession of marijuana. At trial, evidence was introduced by the prosecution that there was found in the house rented by Patricia Laird Horne and Shelton Fletcher Horne and in a car registered to Patricia Laird Horne a quantity of marijuana which in total weighed more than one ounce. Concerning the statute set out above, the Judge charged as follows:

> I tell you that marijuana is a schedule one drug. I tell you that under the law applicable to this case, possession of more than 28 grams or one ounce, one shall be prima facie guilty of the offense wherein it is provided that it is lawful for one to manufacture, distribute, dispense or possess with intent to manufacture, distribute, or dispense

> a controlled substance. So therefore this particular capital statute says that if you have more than 28 grams, or one ounce, it is prima facie evidence of guilt of possession with intent to distribute. This however please understand is not a conclusion. Prima facie means just on the face of it. That is not an absolute conclusion. It is for you to take that as evidence. Prima facie on its face that there was requisite intent to distribute.

Immediately after the above charge, attorney for the Appellants objected to the above charge on the grounds that the Supreme Court of the United States had prohibited such interference with the presumption of innocence under the Constitution. Despite this objection, the trial court judge did not modify that portion of his charge. An exception was raised in similar terms, and in the Appellant's brief before the South Carolina Supreme Court, this issue was raised and briefed.

REASONS THE QUESTION PRESENTED IS SUBSTANTIAL

In County Court of Ulster County vs. Allen, 422 U.S. 140 (1979), the U.S. Supreme Court set out the ideal method for charging a presumption. In that case, the trial judge's instructions made it

> clear that the presumption was merely a part of the prosecution's case, that it gave rise to a permissive inference available only in certain circumstances rather than a mandatory conclusion of possession and that it could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal. 99 S.Ct. at 2226-2227 (emphasis added).

This Court in Sandstrom vs. Montana, 422 U.S. 510 (1979) made it clear that if there is any possibility that the jury might construe a charged presumption in an inpermissible way, then the charge is in violation of the constitution. Sandstrom, 99 S. Ct. at 2457.

A careful study of the instructions set out in full and verbatim above should make it clear that a reasonable juror very well might have determined that absent some amount of proof to the contrary, they were bound to draw the conclusion of intent to distribute from the mere fact of possession of more than an ounce of marijuana.

The statute as charged is unconstitutional for a second reason. Depending on the nature of the presumption, one of the rules of due process requires that there be either a rational connection between the basic fact that the prosecution proved and the ultimate fact presumed, so that the latter is "more likely than not to flow from" the former Ulster, 99 S.Ct. 2228, or else the presumption must be rejected unless the evidence to invoke the inference is sufficient for a

rational jury to find the inferred fact beyond a reasonable doubt. Ulster, 99 S. Ct. at 2229. At least one court has already ruled that a virtually identical statutory presumption involving possession of more than two ounces of marijuana meets neither of these standards. People vs. Serra 55 Mich. A pp. 514, 223 N.W. 2d 28 (1974). In determining such an issue we recognize that it would be extremely helpful to this Court to introduce evidence of experts to elucidate the lack of connection between the fact proved and the fact presumed. However, this was not done below because the South Carolina Supreme Court has prohibited such attempts, stating that

> whether possession of over 28 grams tends to prove more-likely-than-not intent to distribute is a question for the Judge's ruling not for a witness' testimony.
>
> State vs. Byrd, 267 S.C. 87,

91, 226 S.E. 2d 244 (1976). For that reason, the Appellants cannot be faulted for failing to develop such evidence below. At any rate, the Michigan Court concluded as a matter of common experience tht such a presumption does not necessarily follow.

It is obvious that the presumption set out above does not follow beyond a reasonable doubt. We submit that this is the proper standard for your review because under Ulster and the cases cited therein, if the Judge indicated that the presumption was sufficient in and of itself to convict the Defendant, then the presumption must follow beyond a reasonable doubt. The charge set out above indicates just such a requirement.

Respectfully submitted,

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December 1, 1981

OPINION OF THE SOUTH CAROLINA

SUPREME COURT DATED SEPTEMBER 2, 1981

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State, ... Respondent,

v.

Patricia Laird, a/k/a Patricia Horne and Shelton Fletcher Horne, ... Appellants.

Appeal From Aiken County

James Moore, Julius H. Baggett and Rodney A. Peeples, Judges

Memorandum Opinion No. 81-MO-46

Filed September 2, 1981

AFFIRMED

Michael E. Spears, of Spartanburg, for appellants.

Attorney General Daniel R. McLeod and Assistant Attorneys General Kay G. Crowe and Lindy P. Funkhouser, all of Columbia; and Solicitor Sylvia W. Westerdahl, of Aiken, for respondent.

PER CURIAM: Appellants were convicted of possession of marijuana with intent to distribute. They were sentenced to a five (5) year term suspended upon service of thirty (30) months and three (3) years' probation.

After a careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

NOTICE OF APPEAL

Notice is hereby given that Patricia Horne a/k/a Patricia Laird and Shelton Fletcher Horne appeal to the United States Supreme Court from Judgement of the Supreme Court of the State of South Carolina entered on September 2, 1981. This Appeal is taken to the United States Supreme Court by virtue of Title 28 of the United States Code Annotated Section 1257.

Filed this 1st day of December, 1981 Supreme Court of South Carolina, Columbia South Carolina.

Filed this 1st day of December, 1981, Office of the Clerk of Court for Aiken County, Aiken, South Carolina

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No.

PATRICIA LAIRD, a/k/a PATRICIA HORNE
and SHELTON FLETCHER HORNE,

Petitioners,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 81-MO-46, filed September 2, 1981, as reproduced in Petitioner's Appendix A at pages 1-3.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the charge given by the court below create a mandatory or irrebuttable presumption arising from the possession of more than one ounce of marijuana under South Carolina Code Section 44-53-370 (d) (1976 Supp.)?

ARGUMENT

The charge given by the court below created no mandatory or irrebuttable presumption arising from the possession of more than one ounce of marijuana under South Carolina Code Section 44-53-370 (d) (1976 Supp.).

On this issue Petitioners claim that the presumption of intent to distribute

arising from possession of more than one ounce of marijuana unconstitutionally shifts the burden of proof. Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979). The court below charged the language of the statute, stating that where there is "possession of more than 28 grams or one ounce [of marijuana], one shall be prima facie guilty of the offense wherein it is provided that it is unlawful for one to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." (Tr. p. 132, lines 6-11). However, the trial judge went forward with the following caveat:

> This however please understand is not a conclusion. Prima facie means just on the face of it. That is not an absolute conclusion. It is for you to take that as evidence. Prima facie on its face that there was the requisite intent to distribute. (Tr. p. 132, lines 14-18).

The court also went on to advise the jury that the State must prove beyond a reasonable doubt that Petitioners "possessed marijuana in this quantity of more than one ounce with the intention of distributing which has been defined as I've told you, to deliver." (Tr. p. 133, lines 1-3). Finally, since Petitioners did not testify in their defense, the trial court advised the jury that the defendants had the right to rely upon the presumption of innocence for the State to prove their guilt beyond a reasonable doubt. (Tr. p. 134, lines 2-12). It should also be noted that, upon request by counsel, the lower court submitted the lesser included offense of "possession without an intent to distribute." (Tr. p. 137, line 21-p. 138, line 9).

The reference in the statute to possession of more than one ounce of

marijuana as being "prima facie evidence" of guilt is an evidentiary device which sets forth certain basic facts for a jury to use in determining the existence of an element of the crime, here being intent to distribute a controlled substance, and it is a presumption which is rebuttable. State v. Byrd, 267 S.C. 87, 226 S.E. 2d 244 (1976). Such evidentiary devices do not offend the United States Constitution. See, e.g., Ulster County Court v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979); Barnes v. United States, 412 U.S. 837, 37 L. Ed. 2d 380, 93 S. Ct. 2357 (1973); Tot v. United States, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1942); State v. Crocker, 272 S.C. 344, 251 S.E. 2d 764 (1979).

In this case the jury was clearly advised that it was not required to find an intent to distribute, but, rather, it

was permitted to use this evidentiary device in rendering a verdict as to possession with intent to distribute, "simple" possession, or not guilty. Consequently, this case is distinguishable from Sandstrom v. Montana, supra, where the effect of the presumption was, under Montana law, to shift the burden of proof to the defendant, and where no qualifying instructions were used to emphasize the presumption's permissive nature. Id., 442 U.S. at 517-518, 61 L. Ed. 2d at 46-47. The Petition for Certiorari should be, accordingly, dismissed.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Asst. Atty. General

ATTORNEYS FOR RESPONDENT.

APPENDIX

...I tell you that under the law applicable to this case, possession of more than 28 grams or one ounce, one shall be prima facie guilty of the offense wherein it is provided that it is unlawful for one to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance. (Tr. p. 132, lines 6-11).

...possessed marijuana in this quantity of more than one ounce with the intention of distributing which has been defined as I've told you, to deliver. (Tr. p. 133, lines 1-3).

Ladies and gentlemen, I tell you further that the failure of either of these Defendants to testify in their own Defense is not to be considered by you in the slightest extent. As I told you earlier, they have a right to rely upon the burden of the State to overcome the presumption of innocence and as I've told you, they are not required to prove their innocence; but it is always the burden of the State to prove that they are guilty beyond a reasonable doubt. You are not to let their failure to testify influence your decision to the slightest degree; nor is it to be mentioned or discussed during your deliberations. (Tr. p. 134, lines 2-12).

Mr. Foreman, ladies and gentlemen, I charge you that where one is charged with possession of marijuana with intent to distribute, that there is included within that offense the lesser charge of possession without an intent to distribute so depending upon your view of the evidence, you may find either or both of these Defendants

guilty or not guilty of the lesser offense of possession. So consequently that would mean then you have to have some other forms of verdict. I will write these out for you, Mr. Foreman, and send them in to you so you can use that language in developing whatever your verdict is. So I'll write these alternate forms of verdict out for you and send them in there to you. So now if you will please go to your room and you can begin your deliberations. (Tr. p. 137, line 21-p. 138, line 9).